

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re
TWIN CREEKS SUNNYVALE, INC.,
Debtor.

Case No. 94-50548-MM
Chapter 7

**MEMORANDUM DECISION AND
ORDER DISCHARGING COURT'S
ORDER TO SHOW CAUSE**

Date: September, 14 1994
Time: 2:00 p.m.
Courtroom 3070

BACKGROUND

On August 29, 1994, the *San Jose Mercury News* published an article in the *Local & State* section entitled "Collishaw Admits to Shifting Funds." Deputy Counsel for the County of Santa Clara, Kathryn Berry, and counsel for the County of Santa Clara, Elaine Seid, were interviewed and quoted in the story. Ray Collishaw, who serves as the responsible individual for the debtor, Twin Creeks of Sunnyvale, Inc., and debtor's counsel, Henry Rendler, did not return calls to the reporter. Specifically, portions of the article stated:

Santa Clara County also alleges in court documents that some of the Twin Creeks money may have gone to pay expenses at Collishaw's other troubled, high-profile property - the Mountain Winery, home to a long-running concert series. Transferring money between enterprises in bankruptcy **could also be illegal.**

* * *

Collishaw also said in the deposition that one of the reasons he moved Twin Creeks income from the softball complex's corporate account to his personal account was to avoid having the funds "attached by the Board of Equalization (which collects taxes for the state) and the IRS." **Such behavior could be illegal**, attorneys said. (emphasis added.)

DISCUSSION

A student of the English language appreciates that word choice is critical to the message conveyed to the reader. Words paint pictures. The English vocabulary includes many seemingly synonymous words that are in fact characterized by fine and subtle distinctions. The inadvertent choice of one word over another may result in unintended connotations. The choice of words is particularly critical to professionals in journalism and law. However, those who operate in the legal system are meticulous about the distinctions between civil and criminal "terms of art." A term of art is a word or expression that has a precise meaning in some uses or is peculiar to a science, art, profession or subject. In this instance there is a distinction between the word "violate," which often has only civil connotations, and the criminal connotations of the word "illegal." Violating a rule is not necessarily a crime.

The Court is not directing fault to the reporter who wrote the article, nor is the Court necessarily directing fault to the County or its attorneys in the first instance. These sorts of miscommunications will occur in a field as complex and sensitive as bankruptcy law. However, this unfortunate choice of words raises several concerns for the Court.

First, the article can be read to suggest that the Court may have been aware of criminal activity or even may have condoned it. This is a concern because under 18 U.S.C. § 3057(a), a bankruptcy judge has the duty to report facts and circumstances to the United States Attorney if reasonable grounds exist for believing illegal conduct relating to a bankruptcy case has been committed. Not carrying out its responsibilities would place the Court in a bad light. To this date, the Court has no reasonable grounds to believe there is any criminal or fraudulent behavior in this case. The second concern is the potential for interference with the fair administration of justice. Ninth Circuit authority provides that officers of the court have a fiduciary duty not to engage in public

1 debate that would obstruct the fair administration of justice. Levine v. United States District Court
2 for the Central District of California, 764 F.2d 590, 595 (9th Cir. 1985)(*citing* Nebraska Press
3 Association v. Stuart, 427 U.S. 539, 601 n.27 (1976)). Although these cases generally arise within
4 the context of criminal law, in the bankruptcy context, negative innuendo regarding a debtor in
5 reorganization or its principal may obstruct the fair administration of justice in a number of ways. For
6 example, what lender would issue credit to a borrower whose conduct "could be illegal?" Is the
7 public comfortable dealing with a business whose principals "could be engaged in illegal behavior?"
8 Will principals be distracted from the debtor's normal business affairs to defend and explain whether
9 their actions "could be illegal?"

10 For these reasons, the Court met informally in chambers with Elaine Seid and Henry Rendler
11 on September 1, 1994 to discuss the Court's concerns. Ms. Seid indicated she was not aware of
12 criminal conduct which should be reported to the United States Attorney. The Court requested from
13 Ms. Seid a written response advising the Court no later than September 7, 1994 of the County's
14 intended actions, if any, to correct the misinformation. The Court later suggested through her Law
15 Clerk that the County send an appropriate letter to the Editor of the *Mercury News* that would clarify
16 the County's comments and correct any misimpressions that may have been mistakenly attributed to
17 the County's attorneys, whether or not the *Mercury News* chose to publish the letter, but which could
18 be included in the Court's file.

19 Ms. Seid responded by letter of September 8 to the Court setting forth a long explanation of
20 the County's limited involvement in the article. Thereafter, Ms. Seid indicated by telephone call to
21 the Court's Law Clerk on September 9, and the County confirmed by letter dated the same day from
22 William Anderson, Chief Deputy Counsel, that the County would not authorize any communication
23 to the newspaper to correct the use of the word "illegal" as contained in the article or clarify the
24 County's position with respect to bankruptcy crimes.

25 Given the County's position, it became imperative to clarify the record. The Court issued its
26 Order to Show Cause on September 9. The Order required the County and its counsel to appear and
27 show cause, if any, why they should not be enjoined from misinforming the public and failing to
28 correct misimpressions communicated in the newspaper.

1 The hearing was held on September 14, 1994 at 2:00 p.m. The County's attorneys sought
2 a conference off the record in chambers prior to the hearing during which they indicated that the
3 County had elected not to communicate to the newspaper their lack of knowledge of any criminal
4 conduct or their refutation of the use of the word "illegal." The County also indicated that its policy
5 was generally not to initiate dialogue with the press, although it willingly responds to inquiries
6 initiated by the press.

7 When the hearing convened, both Ms. Seid and Ms. Berry, the two attorneys quoted in the
8 article, stated on the record that they did not have evidence of conduct that would rise to the level
9 of a bankruptcy crime. A copy of the official transcript is attached. As a result, no further action is
10 required by the Court at this time with respect to the Court's first concern that it fulfill its duty to
11 report criminal activity.

12 The County has made plain that the suggested clarification directed to the newspaper is a
13 communication that it does not wish to make. The County has pointed out, and the Court agrees
14 with the County's legal position, that ordering the County affirmatively to correct any misimpression
15 communicated in the newspaper would interfere with the County's freedom of expression. The First
16 Amendment freedom of expression is to be zealously and vigorously protected by the courts. Courts
17 have steadfastly "reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy
18 of first amendment values' and is entitled to special protection." Dun & Bradstreet, Inc. v. Greenmoss
19 Builders, Inc., 472 U.S. 749, 759, 105 S. Ct. 2939, 2945 (1985)(citations omitted).

20 The County's attorneys have, at a minimum, participated in creating the public misperception
21 that illegal activity is involved in this bankruptcy case. The County's attorneys apparently have no
22 information of any crimes to back up these allegations. It is regrettable that the County of Santa
23 Clara would not voluntarily correct a public misperception that involves such serious consequences.
24 The Court can only infer that the misperceptions created by the newspaper story are consistent with
25 the County's litigation strategy.

26 There is no apparent solution to the Court's second concern relating to the fair administration
27 of justice. The debtor, of course, has the option of communicating with the press so that a more
28 balanced view may be presented to the public.

1 The hearing on the Order to Show Cause was concluded at 2:30 p.m. The County filed its
2 Opposition to the Order to Show Cause and its supporting Declarations at 3:21 p.m., after the Order
3 to Show Cause had been discharged on the record and the hearing concluded. To the extent the
4 County is using the Bankruptcy Court's files to communicate self-serving declarations to the press
5 under the guise of the litigation privilege, the County should be aware that the scope of the litigation
6 privilege covers only those communications made by a litigant or participant in a judicial proceeding
7 to achieve the objects of the litigation and that have some connection or logical relation to the action.
8 Silberg v. Anderson, 50 Cal.3d 205, 212, 266 Cal. Rptr. 638, 642, 786 P.2d 365 (1990).

9
10 **CONCLUSION**

11 Because the two attorneys for the County quoted in the August 29, 1994 article in the
12 *Mercury News* have stated on the record that they have no evidence that a bankruptcy crime has been
13 committed, there is no reason for the Court to issue any further order. The Order to Show Cause is
14 discharged.

15 Good cause appearing, IT IS SO ORDERED.

16 DATED:

UNITED STATES BANKRUPTCY JUDGE